

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 18 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE LUIS PEREZ-LOPEZ,

Defendant - Appellant.

No. 06-10110

D.C. No. CR-03-02484-FRZ/CRP

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, US District Judge, Presiding

Submitted December 6, 2007^{**}
San Francisco, California

Before: BRIGHT, ^{***} FARRIS, and THOMAS, Circuit Judges.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

^{***} The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Jose Luis Perez-Lopez appeals his conviction under 18 U.S.C. § 924(c)(1)(A). He argues that the evidence, viewed in the light most favorable to the prosecution, is insufficient for any rational trier of fact to conclude he carried or possessed a firearm in relation to or in furtherance of an admitted drug trafficking crime. *See United States v. Carranza*, 289 F.3d 634, 641-42 (9th Cir. 2002) (reciting the standard of review). Perez-Lopez also argues that the district court abused its discretion when it denied him a “mere presence” jury instruction. We affirm.

The jury had to find beyond a reasonable doubt that Perez-Lopez: (1) trafficked drugs; (2) carried or used a gun, or possessed a gun; and, (3) carried or used a gun “during and in relation to [the] . . . drug trafficking crime” or possessed the gun in furtherance of the drug trafficking crime. 18 U.S.C. § 924(c)(1)(A). Perez-Lopez’s guilty plea to marijuana trafficking satisfies the first element. The record supports the trier of fact’s conclusion that Perez-Lopez both carried a gun while trafficking drugs and possessed a gun in furtherance of trafficking drugs. *See Carranza*, 289 F.3d at 641-42.

To establish that Perez-Lopez possessed a gun in furtherance of the trafficking crime, or carried the gun while trafficking drugs, the government was required to show “a *specific* ‘nexus’ between the *particular* firearm and the

particular drug crime at issue.” *United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007) (emphasis in original). The record demonstrates the required nexus. Perez-Lopez possessed a gun that was next to him in a truck carrying 5,000 pounds of marijuana through a region where guns are frequently used to defend drug shipments, and admitted that he was told that the gun was there to help defend the shipment. *See United States v. Krouse*, 370 F.3d 965, 968 (9th Cir. 2004) (finding a sufficient nexus where firearms were “strategically located within easy reach in a room containing a substantial quantity of drugs and drug trafficking paraphernalia.”); *but see United States v. Mann*, 389 F.3d 869, 880 (9th Cir. 2004) (finding the evidence insufficient to convict under § 924(c)(1)(A) where the firearms were kept in a locked safe in a truck separated from the drug manufacture site).

The government did not seek a conviction based on Perez-Lopez’s mere presence, and the district court properly rejected this proposed jury instruction. *See United States v. Negrete-Gonzales*, 966 F.2d 1277, 1282 (9th Cir. 1992) (“If the government’s case is based on more than just a defendant’s presence, and the jury is properly instructed on all elements of the crime, then a ‘mere presence’ instruction is unnecessary.” (citation omitted)). With the jury properly instructed on all elements of the crime, the mere presence instruction was superfluous.

AFFIRMED.